

Supreme Court, U. S.  
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IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. **76-6523**

WILLIAM ROLAND ROBERTS,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME  
COURT OF OHIO

HARVEY B. WOODS  
1212 Second National Building  
Cincinnati, Ohio 45202

ATTORNEY FOR PETITIONER

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Respondent.

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PETITION FOR A WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF OHIO  
-----

HARVEY B. WOODS  
1212 Second National Building  
Cincinnati, Ohio 45202  
(513) 241-3545

PROOF OF SERVICE

I hereby certify that I have served the foregoing Petition for a Writ of Certiorari to the Supreme Court of the State of Ohio upon the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, and upon the Prosecuting Attorney, Hamilton County, Ohio, Hamilton County Court House, Cincinnati, Ohio 45202, by mailing a copy thereof by First Class Mail, postage prepaid, this 6<sup>th</sup> day of April, 1977, and I further certify that I am a member of the Bar of this Court.

Harvey B. Woods  
HARVEY B. WOODS.

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Ohio, entered on December 15, 1976, (Petition for Rehearing denied January 14, 1977) affirming the criminal conviction of petitioner by the Common Pleas Court, Hamilton County, Ohio, which denied to petitioner due process of law, through conviction by denial of due process of law all of which is repugnant to the Fifth, Sixth, Eighth, and Fourteenth Amendments of the Constitution of the United States and a departure from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision over the administration of criminal justice in the Common Pleas Court, Court of Appeals and the Supreme Court of the State of Ohio.

OPINION BELOW

The opinion of the Supreme Court of Ohio is reported in 48 Ohio State Second 221 and is reproduced herein as Appendix A. The Decision and Order of the Court of Appeals for the First Appellate District of



Ohio is unreported and is reproduced herein as Appendix B. The order denying the Petition for Rehearing is unreported and reproduced herein as Appendix C.

#### JURISDICTION

On April 22, 1976, the petitioner was found guilty by a jury in the Common Pleas Court of Hamilton County, Ohio, of aggravated murder with specifications, aggravated robbery, felonious assault and three counts of kidnapping. The jurisdiction of this Court is invoked under 28 United States Code; section 1257 (3).

#### QUESTIONS PRESENTED

1. DOES THE IMPOSITION AND CARRYING OUT OF THE DEATH SENTENCE IMPOSED ON THE PETITIONER VIOLATE THE EIGHTH OR FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES?

2. DID THE EXCLUSION FOR CAUSE OF PROSPECTIVE JURORS EXPRESSING OPPOSITION TO CAPITAL PUNISHMENT VIOLATE PETITIONER'S RIGHT TO A FAIR TRIAL BY A FAIR, REPRESENTATIVE AND IMPARTIAL JURY AS GUARANTIED UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES?

3. WAS THE PETITIONER DENIED DUE PROCESS OF LAW BY THE STATEMENTS AND IMPROPER CONDUCT OF THE PROSECUTOR MADE IN THE PRESENCE OF THE JURY, IN VIOLATION OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

4. WAS THE PETITIONER DENIED DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW BY INSTRUCTIONS OF THE COURT TO THE JURY THAT THE JURY COULD CONSIDER OTHER ACTS OF THE PETITIONER AS PROOF THAT HE DID ACT AS ALLEGED IN THE INDICTMENT, IN VIOLATION OF PETITIONER'S RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

5. WAS THE PETITIONER DENIED DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW AS GUARANTIED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES BY THE CHARGE OF THE COURT TO THE JURY AS THE THE CRIME FOR WHICH THE PETITIONER WAS INDICTED?

CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED

1. This case involves the Fifth, Sixth, Eighth and Fourteenth

Amendments to the Constitution of the United States.

AMENDMENT V:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

AMENDMENT VI:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

AMENDMENT VIII:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

AMENDMENT XIV:

SECTION I

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. This case also involves the following provisions of the

Revised Code of Ohio:

The provisions of the Ohio Revised Code, applicable on the date of the offense for which petitioner was convicted are published in Pages Ohio Revised Code Ann. Volume 29 and effective as of January 1, 1974.

Ohio Revised Code Section 2901.05      Burden and Degree of Proof

"(A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affirmative defense is upon the accused.

(B) As part of its charge to the jury in a criminal case, the court shall read the definitions of "reasonable doubt" and "proof beyond a reasonable doubt," contained in division (D) of this section.

(C) As used in this section, an "affirmative defense" is either of the following:

(1) A defense expressly designated as affirmative;

(2) A defense involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence.

(D) "Reasonable doubt" is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. "Proof beyond a reasonable doubt" is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs."

Ohio Revised Code Section 2903.02      Murder

"(A) No person shall purposely cause the death of another.

(B) Whoever violates this section is guilty of murder, and shall be punished as provided in section 2929.02 of the Revised Code."

Ohio Revised Code Section 2929.02      Penalties for Murder

"(A) Whoever is convicted of aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

(B) Whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life. In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.



(C) The court shall not impose a fine in addition to imprisonment or death for aggravated murder, or in addition to imprisonment for murder, unless the offense was committed with purpose to establish, maintain, or facilitate an activity of, a criminal syndicate as defined in section 2923.04 of the Revised Code, or was committed for hire or for purpose of gain.

(D) The court shall not impose a fine or fines for aggravated murder or murder which, in the aggregate and to the extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to himself or his dependents, or will prevent him from making reparation for the victim's wrongful death."

Ohio Revised Code Section 2929.03    Imposing Sentence for a  
Capital Offense

"(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, then penalty to be imposed on the offender shall be determined:

- (1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;
- (2) By the trial judge, if the offender was tried by jury.

(D) When death may be imposed as a penalty for aggravated murder,

the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender."

Ohio Revised Code Section 2929.04    Criteria for Imposing Death or  
Imprisonment for a Capital  
Offense

"(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

Law and Fact

"In charging the jury, the court must state to it all matters of law necessary for the information of the jury in giving its verdict. The court must also inform the jury that the jury is the exclusive judge of all questions of fact. The court must state to the jury that in determining the question of guilt, it must not consider the punishment but that punishment rests with the judge except in cases of murder in the first degree of burglary on an inhabited dwelling."

Ohio Revised Code Section 2945.59 Proof of Defendant's Motive

"In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant."

The provisions of the Ohio Rules of Criminal Procedure applicable on the date of the offense for which the petitioner was convicted are published in Pages Ohio Revised Code Ann. Volume 29 and effective as of July 1, 1973.

Ohio Rules of Criminal Procedure Rule (B)(9) Challenge for Cause

"A person called as a juror may be challenged for the following cause:"

(9) "That he is possessed of a state of mind evincing enmity or bias toward the defendant or the state; but no person summoned as a juror shall be disqualified by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused, if the court is satisfied, from the examination of the juror or from other evidence, that he will render an impartial verdict according to the law and the evidence submitted to the jury at the trial."

(14) "That he is otherwise unsuitable for any other cause to serve as a juror."

STATEMENT

On August 5, 1974 William Henry Reed and his wife were fishing at Rising Sun, Indiana. At approximately 2:00 P.M. petitioner approached Mr. Reed and attempted to rob he and Mrs. Reed (R-417). Mrs. Reed gave petitioner her wallet and petitioner proceeded to drive the Reeds in their automobile to Cincinnati, Ohio, while Patricia Sue Ramey followed them in a car which was rented by the Petitioner (R-507).

Petitioner had allegedly abducted Mrs. Ramey from Billings, Montana some months prior to the date of August 5, 1974 and she remained with defendant until released in Vernon, Alabama after the death of Mr. Reed.

Upon arrival at the Reeds home in Cincinnati, Ohio petitioner demanded money from the Reeds (R-432) and also took Mr. Reed's gun (R-432). Petitioner tied Mr. and Mrs. Reed in the basement of their home, Mrs. Reed being tied to a pipe in the basement (R-424) and Mr. Reed was tied in a sitting position in the toilet room of the basement with the ropes going over a rafter and pipe above his head (R-469).

The next day, Mary Fischer, a next door neighbor, heard Mrs. Reed calling for help and she and her husband entered the Reed premises, discovering Mrs. Reed tied on the basement floor and Mr. Reed in the toilet room. They then called the police.

When the police officers arrived at the scene they untied Mrs. Reed and finding Mr. Reed dead they called the homicide squad of Cincinnati, Ohio and the body of Mr. Reed was taken to the Hamilton County Morgue.

The Deputy Coroner for Hamilton County, Ohio conducted a post-mortem examination of Mr. Reed and as the result of his examination



it was his opinion that the death of Mr. Reed was caused by asphyxiation due to ligature strangulation.

Petitioner was arrested October 15, 1974 in Portland, Oregon and after being advised of his rights he related to police the events that had occurred at the Reed's house

Petitioner was indicted by the Grand Jury of Hamilton County, Ohio on November 8, 1974 in a six count indictment charging him with aggravated murder with a specification of robbery, aggravated robbery, felonious assault and three counts of kidnapping.

Psychiatrists examined the petitioner prior to trial and he was found sane for the purposes of trial which was commenced before the Common Pleas Court of Hamilton County, Ohio on the 14th day of April, 1975.

It was alleged by the prosecution that the defendant had become angry with the Reeds and had hit Mrs. Reed with a gun and then purposely strangled Mr. Reed when they lied to him about money being hidden in their house.

The defense claimed that the strangulation of Mr. Reed was caused accidentally while he was struggling to free himself from the ropes by which he was tied and the only issues to be resolved were whether or not the petitioner had purposely caused the death of Mr. Reed and whether or not the petitioner had committed the crime of kidnapping Mrs. Ramey.

The petitioner testified in his own behalf and admitted to the kidnapping and robbery of Mr. and Mrs. Reed and the assault of the Reeds, but denied that he had purposely killed Mr. Reed and that Mr. Reed was alive when he left the Reed premises.

The jury found the petitioner guilty on all counts of the indictment and defendant was sent to Lima State Hospital for exami-

nation. On July 3, 1975 a mitigation hearing was conducted pursuant to Ohio Revised Code Section 2929.04 (B), and the court found an absence of any mitigating factors and sentenced the petitioner to death.

Appeal was perfected the Court of Appeals of the First Appellate District of Ohio and on April 19, 1976 that court affirmed the conviction and sentence of petitioner. Further appeal was conducted to the Supreme Court of the State of Ohio and on December 15, 1976 that court affirmed the decision of the Court of Appeals. Rehearing before the Supreme Court of Ohio was denied on January 14, 1977.

HOW THE FEDERAL QUESTIONS WERE RAISED  
AND DECIDED BELOW

In his brief to the Supreme Court of Ohio, petitioner alleged the insufficiency of evidence to support the conviction and sentencing of the petitioner and the failure of the trial court to comply with the requirements of Witherspoon v. Illinois, 391 U.S. 510 (1968), the prejudicial statement of the prosecution and the erroneous instructions of the court to the jury as to the proof of other acts and of the crime with which the petitioner was charged.

Each of these allegations were specifically rejected, State v. Roberts, 48 O.S. 2nd 221, and petitioner's application for rehearing in which the above mentioned Witherspoon v. Illinois requirements were again raised was also denied on January 14, 1977.

REASONS FOR GRANTING THE WRIT

- I.(a) THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE DEATH SENTENCE VIOLATES THE RIGHTS OF THE PETITIONER UNDER THE SIXTH, EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In Gregg v. Georgia 44 U.S.L.W. 5230, and in numerous other decisions of the court, it has been declared that the punishment of death does not invariably violate the Constitution. The issue then to be decided by this court is whether or not the Statutes of the Revised Code of Ohio conform to the requirements as are enunciated in Furman v. Georgia, 408 U.S. 538 (1972).

While it is true, the discretionary feature of determining punishment is removed from the jury in Ohio, it is also a fact that the jury in Ohio has no participation in the determination of whether a person should live or die under a set of facts which that jury had determined

the defendant was guilty of the offense charged.

Ohio places the sole issue of sentence upon the judge who heard the jury trial. Ohio Revised Code Section 2929.03(C)(2), after hearing by which the defendant by a preponderance of the evidence must prove that some mitigating factor did exist.

In Mullaney v. Wilbur, 421 U.S. 684 (1975), the Supreme Court held unconstitutional a Maine Statute imposing on a defendant found guilty of homicide, the burden of establishing facts to show such provocation as would render the offense of manslaughter rather than murder.

The three mitigating factors to be considered by the court in Ohio seem to be an absurdity under Ohio Law. This Court struck down death penalty laws of three states for their failure to provide a "meaningful opportunity for consideration of mitigating factors presented by the circumstances of the particular attributes of the individual offender." Roberts v. Louisiana, 44 U.S.L.W. 5281, 5283, (1976).

It can readily be seen that in the sentencing determinations in capital cases in Ohio, all mitigating factors having to do with the character and background of the defendant were eliminated except "that the offense was primarily the product of the offender's psychosis or mental deficiency" Ohio Revised Code 2929.(B)(3), and does not consider any other personal factors that might call for a sentence other than a death sentence in any particular case. "Other personal factors" is "a constitutionally indispensable part of the process of inflicting the death penalty" Woodson v. North Carolina 44 U.S.L.W. at 5275.

- I.(b) TO TAKE FROM THE JURY THE INHERENT RIGHT OF PARTICIPATION IN SUCH A DECISION DEPRIVES THE DEFENDANT IN OHIO OF A



BODY REPRESENTATIVE OF THE FULL RANGE OF SOCIAL STRATA AND INTERESTS, AND THE RIGHT TO LIVE OR DIE IS GIVEN TO A JUDGE WHO MAY WELL GIVE LESS WEIGHT TO MITIGATING CIRCUMSTANCES DUE TO SOCIAL AND POLITICAL CONSIDERATIONS.

This court never held that jury participation in the sentencing process is constitutionally required. Proffitt v. Florida, 44 U.S.L.W. 5256-5259 (1976), but the court has never specifically deprived a defendant from process of determining sentence by a jury of his peers and indeed the Sixth Amendment of the Constitution of the United States guarantees that:

"... The accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed."

Surely, trial by jury includes determination of all factual matters relating to a particular offense including any mitigating circumstances as to the defendant's state of mind or whether the offender's psychosis or mental deficiency was primarily the reason for the offense.

"... If the defendant preferred the common sense judgment of a jury to the more tutored, but perhaps less sympathetic reaction of a single judge he was to have it."

Duncan v. Louisiana, 391 U.S. 145, 146 (1968), when the presence of aggravating circumstances increases the possibility of a more severe penalty and right to jury determination is constitutionally enforced, so it should be that the jury should determine if there are mitigating factors and the right of the offender to jury determination of such circumstances should also be constitutionally enforced.

II. THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO DETERMINE IF PETITIONER'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION WERE

VIOLATED BY EXCUSING JURORS FOR CAUSE WHEN THEY EXPRESSED SOME OPPOSITION TO CAPITAL PUNISHMENT EVEN THOUGH THEY DID SAY THEY COULD DETERMINE THE GUILT OR INNOCENCE OF THIS DEFENDANT UNDER THE FACTS OF THE CASE.

Forty veniremen were examined during voir dire examination until a jury of twelve plus two alternates were selected. Twelve jurors were pre-emptorily challenged, six by the defense and six by the prosecution, each using all six of the challenges allowed under Ohio Law. Others were excluded for other means and six were excused because of their stand on capital punishment, although they expressed an opinion that they could render a verdict of guilt or innocence.

The full transcript of prospective jurors, Donna Eddingfield (R-60), Alma Niehaus (R-181), Betty Pierce (R-252), Ruth B. Klein (R-330), Roy L. McChesney (R-353) and Dolphus D. McClure (R-358) are set out in a separate appendix attached hereto as Appendix "D".

Counsel for petitioner entered their objection to the question as to whether or not a juror was opposed to capital punishment at the outset, when the first juror was so questioned (R-31-32). This question has no place in the trial of a capital case defendant in Ohio. The burden of finding only guilt or innocence rests upon the jury under the Revised Code of Ohio. Ohio Revised Code Sections 2929.02, 2929.03(C)2 and 2929.04.

Each prospective juror was asked their opinion by the prosecuting attorney as to their stand on capital punishment. If, in their opinion, they did not oppose such punishment, they were further asked if they could enter into a verdict knowing that that verdict could cause the death of the defendant in the electric chair.

If the prospective juror hesitated or had some doubt as to their opinion, an excuse for cause was voiced by the prosecution;



then defense counsel examined the jurors and each was asked if the juror could determine the guilt or innocence of the defendant. Even though the juror answered that he could, the challenge for cause was still sustained by the court.

The court judicially coerced the prospective jurors into answering a question and making a decision on capital punishment that was not required to be made at that point.

Witherspoon v. Illinois, 391 U.S. 510 (1968), was careful to note that prospective jurors can still be excluded for cause if it is unmistakably clear that:

(1) they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them;...

(2) their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt. Whartons Criminal Procedure 12th Edit., Section of Jury Trial, par. 461, pg. 274, Prejudice Against Capital Punishment.

As hereto aforesaid, jurors in Ohio do not vote on possible punishment and would not and could not fall within the exclusion of provision (1) above. The excluded jurors indicated they could determine guilt or innocence and would therefore be excluded from provision (2) above as a ground for challenging a juror for cause.

The prosecution relied on Ohio Rule of Criminal Procedure, Rule 24(B)(9) and Rule 24(B)(14) and as can readily be seen from the reading of those rules and the examination of the jurors excluded, that these rules have no application in this cause. The jurors evinced no enmity toward either the State or the petitioner or was otherwise unsuitable.

The only questions asked the jurors concerned capital punishment

when they were excused for cause by the court. There could be no reason for the cited rule of Ohio Criminal Procedure to be invoked.

As set out in Curfew Davis v. State of Georgia, Docket 76-5403, decided December 6, 1976 cited at 20 Criminal Law Reporter 4092, the court in a per curiam opinion stated in part:

That, however, is not the test established in Witherspoon, and it is not the test that this court has applied in subsequent cases where a death penalty was imposed after the improper exclusion of one member of the venire. See Wigglesworth v. Ohio, 493 U.S. 947, rev'g 18 Ohio St. 2d 171, 248 N.E. 2d 607; Harris v. Texas, 403 U.S. 947 rev's 457 S.W. 2d 903; Adams v. Washington, 403 U.S. 947, rev'g 76 Wash. 2d 650, 458 P. 2d 558. Unless a venireman is "irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings" (391 U.S., at 522 n. 21), he cannot be excluded; if a venireman is improperly excluded even though not so committed, any subsequently imposed death penalty cannot stand.

Permitting the exclusion of these jurors assures the prosecution of a "blue ribbon jury" whose conviction minded tendencies are manifest and eliminates from the jury a cross section of the community that, although opposed to capital punishment or has some hesitation about their feelings on the matter, could still arrive at a verdict under the Law.

A State may not entrust the determination of whether a man is innocent or guilty to a tribunal organized to convict. Witherspoon v. Illinois, 391 U.S. at 521-522.

This court's determination that the exclusion of any of the six jurors violated petitioner's rights under the Sixth Amendment to

the United States Constitution to a jury "truly representative of the community", Carter v. Greene County Jury Commission, 396 U.S. 320-330 (1970), is most urgently required.

III. THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO DETERMINE WHETHER PETITIONER'S RIGHTS UNDER THE DUE PROCESS AND EQUAL PROTECTION OF THE CONSTITUTION WAS VIOLATED BY THE PRE-JUDICIAL STATEMENTS AND IMPROPER CONDUCT OF THE PROSECUTION WITHIN THE HEARING OF THE JURY.

The prosecutor made the statement in the presence of the jury in reference to a question he asked, to which an objection was made and sustained by the court, "If it is a statement made by the defendant by himself to a witness -" and later said to the court, in the presence of the jury, "Well Judge, I mean, a statement of an admission by any defendant is an admission." (R-513).

The statements made were clearly prejudicial to the defendant and improper conduct on the part of the prosecutor. the court told the prosecution not to pursue the statements any further (R-513).

An attempt to prejudice a jury by bringing before it evidence known to be incompetent, with the design and purpose of influencing the jury constitutes misconduct and may prejudice the accused. See 15 A Ohio Juresprudence 2nd p 488.

Even though, as in this case, the court admonished the jury to disregard the statement of the prosecutor, the jury heard the prejudicial remark. To tell them to disregard it after once said is equivalent to trying to unscramble an egg.

The statements by the prosecution in effect forced the petitioner to testify and attempt to explain the meaning of such admission, in violation of petitioner's rights under the Fifth Amendment to the Constitution of the United States. This force violated the petitioner's right to remain silent if he had so desired, for not to do so would

lead the jury to conclude that he had made an admission as to the purposeful killing of the deceased.

IV. WAS THE PETITIONER DENIED DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW TO A FAIR AND IMPARTIAL TRIAL UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BY THE INSTRUCTION OF THE COURT TO THE JURY THAT THEY MAY CONSIDER OTHER ACTS AS PROOF THAT THE PETITIONER DID ACT AS ALLEGED IN THE INDICTMENT.

The equal protection of the law guaranties to the petitioner that Section 2945.59 of the Ohio Revised Code, if constitutional, should be administered with equal protection to the petitioner as well as to any other person and denial of that protection deprives the petitioner to a fair and impartial trial to which he is entitled under the Constitution of the United States.

Asmission of evidence of prior offenses, under Section 2949.59 of the Revised Code of Ohio, over objection of the defendant, without informing the jury of the purpose for which the evidence is admitted is highly prejudicial to the defendant and constitutionally defective.

Further the court instructed the jury (R-713),

..."Evidence of other acts may be considered as proof that the defendant did act as alleged in the indictment."

Evidence of collateral offenses is never received as substantive evidence to prove the commission of the offense on trial. See Whitman v. State, 119 O.S. 285 and State v. Flannery, 31 O.S. 2nd 124.

Where evidence has been admitted for a limited purpose which the State claims shows that the defendant did certain "other acts" which show the motive or intent of the accused or absence of mistake or accident on his part or the defendant's scheme, plan or system in doing the act alleged in the indictment, such evidence must not be considered as any proof whatsoever that the accused did any act alleged in the indictment.



Admission of such testimony is not prejudicial where the defendant does not request the court to instruct the jury at the time it is offered and the court's general charge to the jury adequately covers the situation. See State v. Pigott, 1 Ohio App. 2nd 22.

In the case of the petitioner, the court was requested to so charge the jury and that request was denied (R630, 643, 651).

V. THE PETITIONER WAS DENIED DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES BY THE CHARGE OF THE COURT TO THE JURY AS TO THE CRIME FOR WHICH PETITIONER WAS INDICTED.

The court instructed the jury upon the law of aggravated murder under Ohio Revised Code Section 2903.01(A), killing of another purposely and with prior calculation and design. The charge should have been made under Ohio Revised Code Section 2903.01(B), pertaining to killing while in the commission of a felony.

Out of the presence of the jury the court was reminded by the prosecutor that the wrong charge was given (R-719-722). Later the court, in the presence of the jury, attempted to re-define the section of the Revised Code of Ohio, being Section 2903.01(B), but did not fully explain that under this section the killing must be done purposely.

The petitioner contends that the confusion of the court in regard to this charge, denied the petitioner due process of Law and equal protection of the Law under the Constitution of the United States. The court, when attempting to correct its original mistake, did not properly define for the jury the elements of the crime, which the court is required to do. Ohio Revised Code Section 2945.11. See also, Miller v. State, 125 Ohio St. 415, 15A Ohio Jurisprudence, 2nd par. 449.

"It is the duty of the trial judge to tell the jury all of the essentials which constitute the crime charged, and which the jury must find are sustained by the evidence, beyond a reasonable doubt."

By its incorrect charge in the first instance, followed by an incomplete charge when attempting to rectify its mistake, petitioner feels that he was deprived of his rights under the Fifth and Fourteenth Amendments to the Constitution of the United States.



CONCLUSION

For the reasons in the foregoing, the Petition for a Writ of  
Certiorari should be granted to the petitioner herein.

Respectfully submitted,

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